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URBAN DELTA SDN BHD

v.

TOH AH NOI

B

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN JC
[CIVIL SUIT NO: 22NCVC-1227-10-2012]
13 AUGUST 2014
[2014] CLJ JT(7)

C

LEGAL PROFESSION: *Stakeholder - Sale and purchase agreement - Monies held by advocate and solicitor as stakeholder - Developer's action to recover remaining unpaid stakeholder sums from solicitor - Scale fees for non-contentious matters - Whether discount arrangement enforceable -*

D *Whether existence of discount fee arrangement rendered retainer between developer and solicitor void ab initio - Whether fee arrangement in contravention of s. 114(1) Legal Profession Act 1976 and Solicitors' Remuneration Order 1991 - Illegality and unenforceability of solicitor-client agreement - Whether tainted sale and purchase agreement - Whether*

E *solicitor liable to return remaining sums to developer*

CONTRACT: *Sale and purchase agreement - Stakeholder - Monies held by advocate and solicitor as stakeholder - Developer's action to recover remaining unpaid stakeholder sums from solicitor - Scale fees for non-*

F *contentious matters - Whether discount arrangement enforceable - Whether existence of discount fee arrangement rendered retainer between developer and solicitor void ab initio - Whether fee arrangement in contravention of s. 114(1) Legal Profession Act 1976 and Solicitors' Remuneration Order 1991 - Illegality and unenforceability of solicitor-client agreement -*

G *Whether tainted sale and purchase agreement - Whether developer's rights to claim for remaining stakeholder sums affected*

Urban Delta Sdn Bhd ('the plaintiff'), a developer of serviced apartments had engaged Madam Toh Ah Noi ('the defendant'), a practising advocate and solicitor, to provide legal services in

H respect of the sale of the apartment units. A discount of 65% on the full scale fees prescribed under and pursuant to the Legal Profession Act 1976 ('LPA') was agreed between the parties. The terms of the sale and purchase agreements entered into between the plaintiff and the purchasers of the apartment units required

I each purchaser to pay the sum of 2.5% of the purchase price of the relevant apartment to the defendant, which sums the defendant was to hold as stakeholder ('the stakeholder sums'). After a period of 12 months from the date on which vacant possession was delivered to the purchasers, the stakeholder sums

were to have been released to the plaintiff. The defendant released some but not all of the stakeholder sums, and billed for the full scale fees payable under the LPA, on grounds that the discount arrangement was illegal as it contravened s. 114(1) of the LPA and O. 7 of the Solicitors' Remuneration Order 1991 ('SRO'). The defendant further claimed that she was entitled to set off the outstanding fees that were owed to her by the plaintiff against the remaining stakeholder sums. The plaintiff commenced an action for recovery of the remaining stakeholder sums based both upon its right to claim under s. 103D(6) of the LPA, as well as a separate action to recover the remaining stakeholder sums based upon an alleged breach of the defendant's duties as a stakeholder. The threshold issue to be determined herein was whether the fee arrangement entered into between the parties was illegal and if so, whether this illegality could prevent the plaintiff from claiming the remaining stakeholder sum from the defendant.

Held (allowing plaintiff's claim; dismissing defendant's counterclaim):

(1) A solicitor cannot, within a single file or matter (a) that falls within the scope of non-contentious matters covered by SRO; and (b) that is governed by the terms of a single letter of engagement or agreement with the client, elect to charge full scale fees selectively in respect of particular aspects or areas of the file and waive the fees that would have otherwise been payable in respect of other aspects or areas. To hold otherwise would render otiose s. 114(1) of the LPA. In the present case, no letter of engagement or agreement from the defendant was tendered as evidence, and as such, it was not clear whether or not the services rendered by the defendant was in respect of a single engagement, or whether there were separate agreements governing each transaction. On balance, and taking into consideration the evidence as a whole, it was more likely than not that the services were rendered under a single agreement. Accordingly, the fee arrangement was found to be in contravention of s. 114(1) of the LPA and O. 7 of the SRO, and therefore unenforceable in this court. (paras 38-40)

(2) Section 114(1) of the LPA prohibits a solicitor-client agreement governing non-contentious matters to provide for costs that are lower than the scale fees prescribed pursuant to s. 113. There was no express provision in the LPA that saves the agreement, nor can it be inferred from the language

of the LPA, that the intent of the Legislature was for agreements in contravention of s. 114(1) to nonetheless be valid and enforceable. Accordingly, the existence of the discount fee arrangement rendered the whole retainer between the plaintiff and the defendant *void ab initio*, and it would not be open to the defendant to argue that she may still claim her fees based on the scale provided in the SRO. (para 49)

(3) The defendant had meticulously prepared the invoices, keeping track of the transactions for which fees were paid, and the transactions for which fees would have otherwise been payable had the fees not been waived. Not only was the defendant complicit in putting the illegal fee structure together but she was instrumental in this regard. The agreement between the plaintiff and the defendant was therefore, from its very inception, in contravention of the applicable statutes, and it was not open to the defendant to argue that only the discount fee arrangement was unenforceable and that there existed an agreement with the plaintiff for the full scale fees. As this was an agreement that was *void ab initio*, s. 66 of the Contracts Act 1950 was not applicable. Accordingly, the plaintiff would not be entitled to claim for the return of the fees already paid to the defendant. (paras 51 & 52)

(4) The plaintiff found its claim not under the solicitor-client agreement, but rather under the sale and purchase agreements that it had entered into with the purchasers of the apartment units. The obligation of the defendant qua stakeholder did not arise in contract, but as a consequence of the fiduciary duties she undertook as a solicitor to her client, and as a stakeholder to the parties to the sale and purchase agreements. The illegality and unenforceability of the solicitor-client agreement between the plaintiff and the defendant did not taint the sale and purchase agreements and therefore did not affect the plaintiff's rights to claim for the remaining stakeholder sums. The defendant was therefore liable to return the remaining stakeholder sums to the plaintiff, on the basis of her duties as a stakeholder. No issue of set-off against the stakeholder sums arose, on the basis that the solicitor-client agreement between the parties was *void ab initio*. (paras 55, 56, 59 & 60)

Obiter dicta

(1) Where a fee arrangement for a non-contentious matter falling within O. 3 of the SRO is structured in a manner such that full scale fees are paid in respect of work done on some files or engagements handled by a solicitor and forgone or waived in respect of other files or engagements, such arrangement will not amount to a "discount" within the meaning of O. 7 of the SRO and will not contravene the prohibition contained in s. 114(1) of the LPA against the charging of fees below the prescribed scale fees. This is on the basis that a solicitor is always entitled to waive the payment of fees on any particular matter handled by him or her. (para 37)

Case(s) referred to:
Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***
Datuk M Kayveas & Anor v. Bar Council [2013] 7 CLJ 533 FC ***(refd)***
In re A Solicitor [1956] 1 QBD 155 ***(dist)***
Leong Chiew Keong & Anor v. Renaissance Resources Sdn Bhd [1999] 5 CLJ 226 HC ***(dist)***
Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 SC ***(refd)***
Soh Eng Keng v. Lim Chin Wah [1979] 1 LNS 98 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 66
Legal Profession Act 1976, ss. 103D(6), 113, 114(1), (3), 103E
Solicitors' Account Rules 1990, r. 17
Solicitors' Remuneration Order 1991, O. 3, 7
Solicitors' Remuneration Order 2005, O. 6, 9

Solicitors Act 1932 [UK], ss. 57(1), (3)

For the plaintiff - WK Yee (Amarjit Singh with him); M/s Wan Chin & Co
For the defendant - A Kanesalingam; M/s Kanesalingam & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Azizul Azmi Adnan JC:

Introduction

[1] The plaintiff, Urban Delta Sdn Bhd, was the developer of serviced apartments known as 231 TR in Kuala Lumpur. In 2005,

A the plaintiff engaged the defendant, Madam Toh Ah Noi, who was a practising advocate and solicitor, for the latter to provide legal services in respect of the sale of the apartment units.

[2] The terms of the sale and purchase agreements entered into B between the plaintiff and the purchasers of the apartment units required each purchaser to pay the sum of 2.5% of the purchase price of the relevant apartment to the defendant, which sums the defendant was to hold as stakeholder ("the stakeholder sums"). Under the terms of the sale and purchase agreement, the C stakeholder sums would be available to be used to rectify defects, if any, in the relevant apartment units.

[3] After a period of 12 months from the date on which vacant possession was delivered to the purchasers, the stakeholder sums were to have been released to the plaintiff. The defendant released D some but not all of the stakeholder sums, which is why the plaintiff has now commenced this action.

[4] The defendant claims that she is entitled to set-off outstanding fees that are owed to her by the plaintiff against the E remaining stakeholder sums.

Facts

[5] Sometime in 2004 or 2005, the defendant was introduced to the directors of the plaintiff, Mr Yip Loong Heng and Madam F Phang Moi Fang. At the time, the defendant was practising in the firm of Messrs Mei, Noi & Rakan-Rakan. The plaintiff engaged the defendant as its solicitor in respect of the 231 TR development. The responsibilities of the defendant included preparing the sale and purchase agreements for the sale of the apartment units to G prospective purchasers, as well as preparing the deeds of mutual covenants and financing documentation relating to such sales.

[6] Based on the testimony of the defendant at the trial, the plaintiff either through Mr Yip or Madam Phang or through both H of them had requested for a discount on the defendant's fees, and based on Madam Phang's testimony, a discount of 65% was agreed between the parties.

[7] The defendant also subsequently testified in court that a I 65% discount had been agreed (see para. 5 of the defendant's witness statement and p. 120 of the transcript of the trial). The manner in which this discount arrangement was to be effected

was by the defendant billing the plaintiff in respect of some of the sale and purchase transactions for the apartment units, and not billing the plaintiff for the other units. The defendant's witness statement states, at para. 5:

> We were a small firm, and needed the work. We therefore agreed to the work. We agreed that we would give them an effective discount, by billing them for some of the files and not billing them for other files. Effectively, they received a 65% discount.

[8] The defendant duly discharged her duties and responsibilities as a conveyancing solicitor. I note in this regard that there was nothing in evidence to suggest that the defendant had done so otherwise than in a proper manner, save in respect of the retention of the stakeholder sums, which we will get to later.

[9] Between January 2006 and September 2008, Messrs Mei, Noi & Rakan-Rakan issued some ten invoices to the plaintiff, billing the latter for professional services rendered. It is not disputed that the plaintiff paid all these invoices, the total sum of which amounted to RM249,681.90. (There were sums reimbursed by the defendant to the plaintiff, but these are not material to the issue at hand.)

[10] These invoices from Messrs Mei, Noi & Rakan-Rakan contained two tables of figures. One table showed the actual amount invoiced and payable. It was established in evidence that the other table showed a calculation of the fees that would have been payable for all the units transacted, without the 65% discount, the idea being that the plaintiff would only be liable to pay the amount invoiced in the first table, and would be able to establish the fees that would have otherwise been payable had there not been any discount, in order to verify that the correct discount was applied. There would be a small balancing sum paid by the defendant to the plaintiff, as the invoiced amount may not exactly come up to 35% of the full fees.

[11] The defendant performed conveyancing services in respect of 183 apartment units and billed only in respect of the sale and purchase agreements for 65 apartment units and the financing documentation for 18 units.

[12] On 30 June 2009, the partnership of Messrs Mei, Noi & Rakan-Rakan was dissolved, and the defendant continued her practice as Messrs Noi from 1 July 2009.

[13] As mentioned above, the terms of the sale and purchase agreements entered into between the plaintiff and the purchasers of the apartment units required each purchaser to pay the sum of 2.5% of the purchase price of the relevant apartment to the defendant, which sums the defendant was to hold as stakeholder. The stakeholder sums were to have been released after 12 months of delivery of vacant possession, which coincides with the period within which the plaintiff would be liable to rectify defects in the apartment units.

[14] An aggregate sum of RM1,936,603.88 was paid by the purchasers of the apartment units to Messrs Mei, Noi & Rakan-Rakan. The defect liability period of one year expired on 9 January 2010, following which the stakeholder sums were to have been paid by the defendant to the plaintiff, in accordance with the terms of the sale and purchase agreements.

[15] The defendant did not immediately pay the stakeholder sums. Instead, she paid the sum of RM1,626,988.03 in eight instalments, beginning on 14 January 2010 and with the last payment having been made on 9 July 2010.

[16] No explanation was proffered in evidence as to the reasons for the delay in payments. A balance of RM309,615.85 of the stakeholder sums remains unpaid. It should be noted that throughout the period following the 9 January 2010, the plaintiff gave a number of reminders to the defendant to pay the stakeholder sums, culminating in a formal demand on 15 July 2010.

[17] On 2 August 2010, the plaintiff received three new invoices from the defendant. Two of these invoices were dated 15 January 2010, while the third, 2 June 2010. The total fees claimed in these 2010 invoices were in excess of RM490,000, and substantially relate to work done between 2005 and 2008.

[18] It is important to note that, at no time prior to receipt by the plaintiff of the 2010 invoices, was it made known to it that there were outstanding fees in respect of the conveyancing services rendered by Messrs Mei, Noi & Rakan-Rakan. It was only after the plaintiff demanded payment of the stakeholder sums did the defendant issue these 2010 invoices. Although the invoices appeared to have been dated January and June 2010, these invoices were only received by the plaintiff on 2 August 2010.

[19] Why was there a delay in issuing the 2010 invoices? The following is an extract of the transcript of the defendant's testimony during cross examination, when the defendant was asked by the counsel for the plaintiff why she had not issued the invoices earlier, at the time the work was done:

> I was actually ... it was a very difficult situation. On one hand, we've agreed to give a discount, and on another hand, you try to right a wrong, so I have ... I was in a dilemma at that time. The bill was actually prepared, but it was very difficult to send out, knowing her, the plaintiff's er, expectation, that they want the discount. So it was actually very difficult. And at the same time I was also actually counting what was actually not paid. I had to do a calculation before I can do all this.

[20] The dilemma to which the defendant refers was, on the one hand, holding herself to the bargain struck with the plaintiff, and on the other, complying with the no-discount rule under the Solicitors' Remuneration Order 1991 (which is applicable in this case; see para. 30 post).

[21] On 28 September 2010, the plaintiff filed a complaint against the defendant with the Malaysian Bar Advocates & Solicitors Disciplinary Board. On 17 February 2012, the Disciplinary Board ordered the defendant to refund the remaining stakeholder sums to the plaintiff. This order was given pursuant to the powers of the Disciplinary Board under s. 103D of the Legal Profession Act 1976 ("LPA"). In addition, the Disciplinary Board also ordered for the defendant to be struck off the roll of advocates and solicitors of the High Court of Malaya.

[22] Section 103D(6) of the LPA provides for sums that are ordered to be restituted to be recovered as a civil debt. I note that, in this case, the plaintiff's cause of action is based both upon its right to claim under s. 103D(6) of the LPA, as well as a separate action to recover the remaining stakeholder sums based upon an alleged breach of the defendant's duties as a stakeholder under the sale and purchase agreement entered into between the plaintiff and each purchaser of the apartment units.

Analysis

[23] The threshold issue to be determined in this case is whether the fee arrangement entered into between the parties is illegal. If the fee arrangement is illegal, then the next question is whether this illegality would prevent the plaintiff from claiming the remaining stakeholder sums from the defendant.

The Legality Of The Fee Arrangement

[24] As explained earlier, the fee arrangement involved the defendant charging for full scale fees for the conveyancing work undertaken for some of the apartment units, and for the defendant to forgo the fees in respect of the other units. On the evidence, the defendant had charged for work done in respect of the sale and purchase agreements for 65 apartment units and the financing documentation for 18 units, out of a total of 183 units.

[25] It will not be necessary for me to determine whether there had actually been any formal waiver of the rights of the defendant to charge for the fees that had not been billed by September 2008, on the basis that the defendant had conceded that there had in fact been an agreement for a 65% "discount" on the full scale fees (see para. 7, *ante*). No evidence was adduced by the defendant to show that the plaintiff had subsequently agreed to be billed for remaining "unbilled" fees, as represented in the 2010 invoices.

[26] The gist of the defendant's contentions was that:

(a) The fee arrangement was illegal on the basis that it contravened s. 114(1) of the LPA and the applicable solicitors' remuneration order; and

(b) The defendant was accordingly entitled to the full scale fees prescribed under the solicitors' remuneration order in respect of all 183 apartment units, despite the fact that there was no agreement with the plaintiff to this effect.

[27] On the issue of illegal contracts, the Supreme Court in *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 had this to say:

> Courts have always set their face against illegality in any contract. It is very well settled that the Courts take judicial notice of such illegality and refuse to enforce the contract, and such judicial notice may be taken at any stage, either at the Court of first instance or at the appellate stage irrespective of whether illegality is pleaded or not where the contract is *ex facie* illegal.
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> When the contract is not *ex facie* illegal, then on the question of pleadings, there is only one situation where illegality need not be pleaded when the Court can still take judicial notice of illegality and refuse to enforce it. The situation is when facts which have not been pleaded emerge in evidence in the course of the trial showing clearly the illegality e.g. the illegal purpose of the

contract, or its illegal consideration, with the presence of all relevant circumstances, see e.g. *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] 1 LNS 115, *Leong Poh Chin v. Chin Thin Sin* [1959] 1 LNS 50 and *North Western Salt Co. v. Electrolytic Alkali Co.* [1914] AC 461 just to mention a few. The existence of such a situation in the instant appeal is warranted by the facts that emerged in evidence, including affidavit evidence.

[28] Section 114(1) of the LPA provides as follows:

(1) Whether or not any order is in force under section 113, an advocate and solicitor and his client may, either before or after or in the course of the transaction of any non-contentious business, make an agreement as to the remuneration of the advocate and solicitor in respect thereof:

Provided that such agreement shall not provide for costs at a scale lower than that provided by any order made under section 113.

[29] Section 113 empowers the Solicitors Costs Committee to make general orders prescribing and regulating the remuneration of solicitors in respect of non-contentious business. This committee, in exercise of its powers under s. 113, has made the Solicitors' Remuneration Order 2005 ("SRO 2005"), which prescribes the scale fees applicable for conveyancing transactions. This 2005 order came into force on 1 January 2006 (which, on the evidence, was after the defendant had been engaged by the plaintiff) and revoked the previous Solicitors' Remuneration Order 1991 ("SRO 1991").

[30] Order 9 of the SRO 2005 provides:

9. Notwithstanding the coming into operation of this Order, any non-contentious business commenced before the coming into force of this Order shall be governed by the provisions of the Solicitors' Remuneration Order 1991.

[31] Accordingly, the SRO 1991 applies in this case. Order 7 of the SRO 1991 prohibits any discounts on scale fees:

7. There shall be no discount on scale fees unless expressly provided by the Schedules.

[32] The issue at hand is whether the fee arrangement contravened s. 114(1) of the LPA and/or O. 7 of the SRO 1991.

[33] The counsel for the defendant cited the case of *Leong Chiew Keong & Anor v. Renaissance Resources Sdn Bhd* [1999] 5 CLJ 226 in support for his contention that a discounted fee arrangement for non-contentious legal services cannot be enforceable. This case involved a firm of solicitors suing the defendant for conveyancing work in respect of land that the defendant had intended to purchase. In this case, RK Nathan J found that, as a matter of fact, there was no agreement between the parties for fees lower than the prescribed scale fees. The learned judge however went on to consider the effect of s. 114(1) and the English case of *In re A Solicitor* [1956] 1 QBD 155, and said:

> It can be seen that ss. 114(1) and (3) of the Legal Profession Act 1976 enacts almost word for word, the provisions contained in ss. 57(1) and (3) of the Solicitors Act 1932. It is my judgment, therefore, that the *ratio* of *In re A Solicitor (supra)* should be applied here. That is to say, any agreement between a solicitor and his client regarding remuneration in non-contentious matters must be in writing.
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> Section 114(1) of the Legal Profession Act 1976 however provides an important qualification to s. 57(1) of the Solicitors Act 1932. It states that although a solicitor and his client may make such agreements, it is subject to the provision '... that such agreement shall not provide for costs at a scale lower than that provided by any order made under s. 113'.
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> In very clear and express terms, this section thus prohibits any agreement which seeks to provide for a solicitor's remuneration to be charged at a scale lower than the prescribed scale fee, whether or not that agreement is in writing. The only possible agreements allowable by the Legal Profession Act 1976 is therefore agreements that are in writing and provide for costs at a scale higher than the prescribed scale.

[34] Mr Amarjeet Singh, for the plaintiff, argued that:

(a) There was no contravention of s. 114(1) because full scale fees were charged and paid in respect of the 65 sale and purchase agreements and the 18 financing sets of financing documentation;

(b) The waiver of the remaining fees was not prohibited by s. 114(1); and

(c) Accordingly, no charge was made for costs at a scale lower than that provided by the applicable solicitors' remuneration order.

[35] He further argued that the "no discount rule" embodied in O. 6 of the SRO 2005 did not apply, as the SRO 2005 only came into force only on 1 January 2006. While he is correct in this regard, nonetheless O. 7 of the SRO 1991 applies in this case, and has much the same effect as its successor provision.

[36] I believe the correct positions in law with respect to the practice of "discounting" by solicitors are as set out in the following paragraphs.

[37] Where a fee arrangement for a non-contentious matter falling within O. 3 of the SRO 1991 is structured in manner such that full scale fees are paid in respect of work done on some files or engagements handled by a solicitor and foregone or waived in respect of other files or engagements, such arrangement will not amount to a "discount" within the meaning of O. 7 of the SRO 1991 and will not contravene the prohibition contained in s. 114(1) of the LPA against the charging of fees below the prescribed scale fees. This is on the basis that a solicitor is always entitled to waive the payment of fees on any particular matter handled by him or her.

[38] However, a solicitor cannot, within a single file or matter:

(a) That falls within the scope of non-contentious matters covered by the 1991 Order; and

(b) That is governed by the terms of a single letter of engagement or agreement with the client,

elect to charge full scale fees selectively in respect of particular aspects or areas of the file and waive the fees that would have otherwise been payable in respect of other aspects or areas. To hold otherwise would render *otiose* s. 114(1), from a perspective of the policy objective intended to be achieved by this provision. Support for this position can also be obtained from the words of s. 114(1) itself, the proviso to which states that "such agreement shall not provide for costs at a scale lower" than that provided by the applicable solicitors' remuneration order. This means that, in respect of every agreement entered into between a solicitor and his or her client that is governed by a solicitors' remuneration order, the fees charged under that agreement must be the full scale fees. Of course, a solicitor would also be entitled to waive the fees entirely under the agreement (and only charge disbursements, for example), but he must do one or the other.

[39] In the present case, no letter of engagement or agreement from the defendant was tendered as evidence, and as such, it was not clear whether or not the services rendered by the defendant was in respect of a single engagement, or whether there were separate agreements governing each transaction. On balance, and taking into consideration the evidence as a whole (in particular the way the invoices where issued), I find that it was more likely than not that the services were rendered under a single agreement.

[40] Accordingly, I find that fee arrangement to be in contravention of s. 114(1) of the LPA and O. 7 of the SRO 1991, and therefore unenforceable in this court.

[41] It is not necessary for me to rule on whether the *obiter* dicta in *Leong Chiew Keong & Anor v. Renaissance Resources Sdn Bhd* represents the correct position under Malaysian law, although I should like to point out that, if this is indeed the case, it may result in considerable inequity in some cases, in particular for lawyers who may have performed their work but have not been paid their fees and where their clients have not countersigned the letters of engagement. To explain, I will make a short digression into the history and context of the requirement that solicitor-client agreements must be made in writing.

[42] The original provision as contained in the Attorneys and Solicitors Act 1870 of England was an enabling provision, and not a prohibitory one. The following extract from the judgment of Fletcher Moulton LJ in *Clare v. Joseph* [1907] 2 KB 369 at p. 376 explains the common law position before the introduction of the 1870 Act:

> At that date agreements between a solicitor and his client as to the terms on which the solicitor's business was to be done were not necessarily unenforceable. They were, however, viewed by the greatest jealousy by the courts, because they were agreements between a man and his legal advisor as to the terms of the latter's remuneration, and there was so great an opportunity for the exercise of undue influence, that the courts were very slow to enforce such agreements where they were favourable to the solicitor unless they were satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitor's part to benefit himself at the client's expense. But when it appeared that the agreement was favourable to the client, the courts often held the solicitor to his bargain, for there was no ground in equity why they would be suspicious of a bargain of that kind.

[43] The 1870 Act therefore permitted an agreement to be made between a solicitor and his client, without the uncertainty of the possibility that such an agreement would be struck down for reasons that it breached the fiduciary duties that the solicitor owed to the client.

[44] The law subsequently evolved in England, culminating in, at the time *In re A Solicitor* was decided, the Solicitors Act 1932, ss. 57(1) and 57(3) of which (as pointed out by RK Nathan J in *Leong Chiew Keong & Anor v. Renaissance Resources Sdn Bhd* at p. 232) are in *pari materia* with ss. 114(1) and 114(3) of the LPA, save that the English provisions do not contain the *proviso* to s. 114(1).

[45] Section 114(3) of the LPA provides:

> (3) The agreement shall be in writing and signed by the person bound by it or as his agent on his behalf.

[46] The existence of the proviso to s. 114(1) substantially changes the complexion of the legislation. In England under the 1932 Act, a solicitor may for non-contentious matters depart from the scale fees provided his client signs an agreement in writing. He can charge less than the scale fees. He can even charge more than the scale fees, in which case it is understandable that the law requires him to reduce this arrangement to writing in order to protect the interests of the client, seeing as how the law has, since 1870, displaced the stricter requirements of equity.

[47] In Malaysia, however, the proviso to s. 114(1) does not permit a solicitor to charge less than the scale fees. To therefore require that all solicitor-client agreements be made in writing and signed by clients does not, to my mind, serve any useful policy objective, and only introduces higher costs of compliance for solicitors, who will now need to ensure written agreements are in place even for matters governed entirely by scale fees, for fear of the risk of recoverability in the event that an oral agreement is struck down for unenforceability. It would make more sense for the requirement in s. 114(3) to only apply where a solicitor is seeking to charge more than the scale fees, as this is where the law should step in to protect the rights of clients, as consumers of legal services.

The Effect Of Illegality

[48] The next issue for consideration is the effect of the illegality of the discounted fee arrangement. The legal position is neatly summarised in the following passages of Hashim Yeop Sani CJ in *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 at p. 65; [1990] 1 MLJ 356 at p. 361 in delivering the judgment of the Supreme Court:

> [I]n our view it may be stated as a general principle that a contract the making of which is prohibited by statute expressly or by implication, shall be void and unenforceable unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself.
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> ...
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> [I]t is also a principle established by these authorities that where it is shown that a contract is void because it is prohibited by statute, the Court as a general rule should not lend its assistance to enforce the contract.

[49] Section 114(1) of the LPA prohibits a solicitor-client agreement governing non-contentious matters to provide for costs that are lower than the scale fees prescribed pursuant to s. 113. There is no express provision in the LPA that saves the agreement, nor can I infer from the language of the LPA that the intent of the legislature was for agreements in contravention of s. 114(1) to nonetheless be valid and enforceable. Accordingly, the existence of the discount fee arrangement renders the whole retainer between the plaintiff and defendant void *ab initio*, and it will not be open to the defendant to argue that she may still claim her fees based on the scale provided in the SRO 1991.

[50] In this regard, the cases of *In re A Solicitor* and *Leong Chiew Keong & Anor v. Renaissance Resources Sdn Bhd* may be distinguished on their facts. In the former case, the client sought to enforce an alleged oral agreement for the solicitor to charge less than the authorised scale fees for some conveyancing transactions and nothing at all (save for disbursements) in others. The facts of the latter, Malaysian case, are similar: here it was alleged that by the client that there was an oral agreement to cap the fees for the conveyancing work undertaken by the solicitor at RM100,000, when the scale fees prescribed a fee that was almost four times more. In both these cases, the court refused to enforce the alleged oral agreements, and upheld the full scale fees.

[51] The facts of the present case differ starkly. I find as a matter of fact that the mechanism by which the discount was to be effected was devised by the defendant. She meticulously prepared the invoices, keeping track of the transactions for which fees were paid, and the transactions for which fees would have otherwise been payable had the fees not been waived. Not only was the defendant complicit in putting the illegal fee structure together but she was instrumental in this regard. The agreement between the plaintiff and the defendant was therefore from its very inception in contravention of the applicable statutes, and it is not open to the defendant to argue that only the discount fee arrangement is unenforceable and that there exists an agreement with the plaintiff for the full scale fees. In any event, it is a finding of this court that, as a matter of fact, the plaintiff had not agreed to the payment of the fees claimed under the 2010 invoices (see para. 25 *ante*).

[52] As this is an agreement that is *void ab initio*, s. 66 of the Contracts Act 1950 will not apply. In *Soh Eng Keng v. Lim Chin Wah* [1979] 1 LNS 98; [1979] 2 MLJ 91, Wan Yahya J (as His Lordship then was) delineated the limits of the application of this provision:

> I am of the firm opinion that the words 'discovered' and 'becomes' appearing in s. 66 above are not superfluous words used by the legislators. On the contrary, they are words inserted in that section for a specific reason and that is to qualify or restrict the type of agreement to which that section will apply. As I have said in the earlier case, the term "discover" here clearly indicates something which the parties were unaware of at the time of making the agreement and which they gained sight of or detected subsequently and the word 'becomes' refers to something not present when the contract was signed but came into being at a later stage.

[53] Accordingly, the plaintiff will not be entitled to claim for the return of the fees already paid to the defendant.

The Basis Of The Plaintiff's Claims And The Duties Of A Stakeholder

[54] However, that the agreement between the plaintiff and defendant for the provision of legal services by the latter to the former is *void ab initio* does not prevent the plaintiff from claiming for the remaining stakeholder sum.

[55] The plaintiff found its claim not under the solicitor-client agreement, but rather under the sale and purchase agreements that it has entered into with the purchasers of the apartment units. The obligation of the defendant *qua* stakeholder does not arise in contract, but as a consequence of the fiduciary duties she undertakes as a solicitor to her client, and as a stakeholder to the parties to the sale and purchase agreements.

[56] The third schedule to the sale and purchase agreements provides for the schedule of payments to be made by the purchasers. Item 4 of the third schedule to the sample sale and purchase agreement tendered in evidence is reproduced below.

4.	On handing over of vacant possession as in item (3) and to be held by the Vendor's Solicitors as stakeholder for payment to the Vendor as follows:-	2.5	RM7,677.~~00~~ 32
	(i) 2.5% at the expiry of twelve (12) months after handing over of vacant possession		
	Total	100	RM307,113.00

[57] It was not disputed that the defendant received the stakeholder sums in her capacity as the solicitor to the plaintiff, which is the vendor referred to in item 4 above.

[58] That the stakeholder is a trustee is well established in law. The Federal Court in *Datuk M Kayveas & Anor v. Bar Council* [2013] 7 CLJ 533 succinctly reviews the authorities on this point:

> In our system of conveyancing, "the word 'stake' is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future: and whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held" (*Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400; [1988] 1 MLJ 116 per Hashim Yeop A Sani SCJ, as he then was, delivering the judgment of the former Supreme Court). "Solicitors who hold funds which are paid to them as stakeholders hold those funds as trustees for the client, whose property the funds remains at all times. Such funds are not held in a

contractual or *quasi*-contractual capacity" (*Halsbury's Laws of England* 4th edn. reissue vol. 44(1) para. 126). "... the obligations arising under a solicitor's undertaking go beyond contractual effect. They are obligations which a solicitor has a professional duty, as well as a contractual duty, to observe" (*Bentley and Another v. Gaisford* [1997] 1 All ER 842, 848 per Sir Richard Scott VC). When solicitors hold funds as stakeholders, they hold those funds as trustees and not in a contractual or *quasi*-contractual capacity (see *Alimand Computer Systems Ltd v. Radcliffes & Co*, The Times 6 November 1991). "If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit 'as stakeholder', he is under a duty to hold it in *medio* pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the evidence: see *Skinner v. Trustee of Property of Reed* [1967] 2 All ER 1286 at p. 1287, [1967] Ch 1194 at p. 1200) per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank ..." (*Burt v. Claude Cousins & Co Ltd* [1971] 2 QB 426 per Lord Denning MR in his dissenting judgment, which statement of the law was accepted by the House of Lords in *Sorrell v. Finch* [1977] AC 728, and referred in *Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor (supra)*, *Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor (supra)* and *OCBC Bank (Malaysia) Bhd & Ors v. Lee Lee Fah & Ors & Another Appeal (supra)*, amongst others). "Once a solicitor holds money in trust for his client or any other party for a purpose, it does not matter whether the amount is sufficient to be utilised for that purpose. The money remains to be in trust" (*Selvaratnam Vellupillai v. Dr Jayabalan Karrupiah* [2009] 1 CLJ 872; [2009] 1 MLJ 794 per Zaki Azmi CJ, delivering the majority judgment of the court). Therefore, it is beyond argument that a stakeholder is a trustee and that the breach of a stakeholding term is not just a breach of undertaking but also a breach of trust.

[59] The illegality and unenforceability of the solicitor-client agreement between the plaintiff and the defendant does not taint the sale and purchase agreements and therefore does not affect the plaintiff's right to claim for the remaining stakeholder sums.

[60] I therefore rule that the defendant is liable to return the remaining stakeholder sums to the plaintiff, on the basis of her duties as a stakeholder. No issue of set-off against the stakeholder sums arises, on the basis that the solicitor-client agreement between the parties is *void ab initio*.

A **Pending Appeal By The Defendant At The Court Of Appeal**

[61] Under s. 103E of the LPA, any party aggrieved by the decision of the Disciplinary Board has the right to appeal to the High Court within one month of receipt of the notification of the B decision or order. The defendant had not appealed against the decision of the Disciplinary Board within the prescribed period. The defendant subsequently applied to the High Court for an extension of time to appeal against the decision of the Disciplinary Board. This application was dismissed by Zaleha binti Yusof J. on C 16 June 2014, and the defendant has now filed a notice of appeal with the Court of Appeal against this decision.

[62] The fact that this appeal is pending does not preclude me from considering and deciding in this present case. As I had mentioned (at para. 22, *ante*) the plaintiff's cause of action is based D both upon its statutory right under s. 103D(6) of the LPA to claim for a civil debt in respect of the sum ordered to be restituted by the Disciplinary Board, as well as a separate action to recover the remaining stakeholder sums based upon the breach of the defendant's duties as a stakeholder. E

[63] I have determined that the defendant is liable on the latter cause of action. Accordingly, it will not be necessary for me to examine the decision of the Disciplinary Board or the findings of fact in the report issued by the Disciplinary Committee of the Bar F Council. It will also not be necessary for me to address the claims of the defendant that the determination by the Disciplinary Board was illegal and irrational.

Decision

G

[64] For the reasons set out above, there will be judgment as follows:

(a) The defendant to pay the plaintiff the sum of RM309,615.85, representing the remaining stakeholder sums;

H

(b) The defendant to pay to the plaintiff RM54,093.72, representing interest on the remaining stakeholder sums as at 31 August 2012;

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(c) The defendant to pay to the plaintiff interest at a rate of 2% per annum on the sum of RM309,615.85 for the period beginning 1 September 2012 until the date of this judgment;

(d) The defendant to pay to the plaintiff interest at a rate of 5% per annum on all sums remaining unpaid by the defendant from the date of this judgment until the date of payment;

(e) The defendant to bear the costs of the action;

(f) The defendant's counterclaim is dismissed with costs to be borne by the defendant.

[65] For completeness, I have addressed the respective parties' issues to be tried below:

Plaintiff's Issues to be Tried

1. Whether the plaintiff is entitled to recover from the defendant the sum of RM309,615.85 as was ordered by the Advocates and & Solicitors Disciplinary Board's order dated 17 February 2012.

   The plaintiff is entitled to recovery of this sum, through its action against the defendant for breach of her duties as stakeholder (paras. 54 to 60 *ante*).

2. Whether the defendant is entitled to counterclaim the sum of RM576,342.60 or alternatively the sum of RM233,907.66 with interest and costs thereon to the extent pleaded in the counterclaim against the plaintiff.

   The defendant's counterclaim fails, on grounds that the solicitor-client agreement between the plaintiff and defendant is void *ab initio* (paras. 38 to 40 and 49 to 51, *ante*).

3. Whether the defendant is precluded from seeking the reliefs sought in the counterclaim upon the defences of the plaintiff against the defendant.

   The counterclaim fails on grounds that the solicitor-client agreement is illegal and therefore void *ab initio* (paras. 38 to 40 and 49 to 51, *ante*).

4. Whether the illegality prevents the defendant from seeking the reliefs in the counterclaim as sought against the plaintiff.

   Yes, see paras. 49 to 51, *ante*.

A 5. Whether there is limitation or inordinate delay or laches on the part of the defendant and/or circumstances as pleaded that precludes the defendant from sustaining the counterclaim against the plaintiff.

B Limitation, delay and laches are not relevant as I have ruled that the counterclaim fails on grounds that the solicitor-client agreement was illegal and therefore void *ab initio*. It is therefore unnecessary to consider the plaintiff's defences to the counterclaim.

C 6. Whether the plaintiff received bills duly issued in accordance with the provisions of the Legal Profession Act 1976 from the legal firms in which the defendant had so practised at all material times.

D No, in as far as the 2010 invoices are concerned. These bills were not duly issued because:

(a) There was no agreement between the plaintiff and the defendant for the fees claimed in the 2010 invoices (paras. 7 and 25, *ante*); and

E

(b) In any event, the whole solicitor-client agreement was void for illegality.

Defendant's Issues To Be Tried

F

1. Whether the defendant is required to pay to the plaintiff the sum of RM309,615.85 pursuant to the Advocates & Solicitors Disciplinary Board order dated 17 February 2012?

G The defendant is liable to pay this amount on account of the defendant's duty as a stakeholder (paras. 54 to 60 *ante*).

2. Whether the Disciplinary Board order suffers from illegality, irrationality or procedural impropriety and should be ignored by way of a collateral challenge in these proceedings?

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In determining the liability of the defendant to pay the remaining stakeholder sums to the plaintiff, it was not necessary for me to examine the Disciplinary Board order, as the plaintiff has succeeded in its cause of action in trust

I against the defendant in her capacity as a stakeholder (paras. 61 to 63 *ante*).

3. Whether the defendant can charge full scale fees as provided under the SRO 2005 for the conveyancing work done by her at the plaintiff's request despite previously agreeing to give a 65% discount?

   No, on account that the solicitor-client agreement between the plaintiff and defendant is void *ab initio* on grounds of illegality (paras. 49 to 51, *ante*).

4. If the answer to question 3 is in the affirmative, whether the defendant could deduct the balance of the scale fees from the monies payable to the plaintiff being retained by the defendant in her client's account pursuant to r. 17 of the Solicitors' Account Rules 1990?

   Not applicable.

5. Whether the plaintiff's claim is barred by illegality?

   No, on the basis that the plaintiff's cause of action is not rooted in the solicitor-client agreement but arises as a result of the trustee duties imposed on the defendant as a stakeholder under the sale and purchase agreements (paras. 54 to 60 *ante*).

6. Whether the defendant's counterclaim is barred by illegality?

   Yes, see paras. 49 to 51, *ante*.